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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~1124.~~ 94

RALPH J. PERK,
County Auditor of Cuyahoga County, Ohio,
Petitioner,

vs.

THE PARK INVESTMENT COMPANY,
and
BOARD OF TAX APPEALS OF THE STATE OF OHIO,
MERRILL D. BROTHERS,
ROBERT E. ZELLAR,
EDWIN F. SAWICKI,
Respondents.

BRIEF OF RESPONDENT, THE PARK INVESTMENT COMPANY, In Opposition to Petition for Writ of Certiorari.

JOHN E. FORRESTER and
RALPH D. KOVANDA,
711 Park Building,
Cleveland 14, Ohio,
Attorneys for Respondent
The Park Investment Company.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

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ADDITIONS TO STATEMENT OF THE CASE.

Petitioner omitted some s. lient facts from its Statement of the Case which this Respondent wishes to bring to the attention of this Court.

(1) All of the evidence presented before the Supreme Court of Ohio, excluding only the "Uniform Rules and Regulations" promulgated by the Board of Tax Appeals which were appended to its Answer, was produced by this Respondent. Neither the Petitioner here nor the other Respondents chose to adduce any further evidence to demonstrate that this Respondent's contentions were erroneous. In such a posture, Respondent believes it must

be concluded that this Respondent clearly and conclusively proved its case.

(2) Petitioner's Statement of the Case implies that the statistics of the Board of Tax Appeals which were compiled over a period of years were insubstantial. Actually, the study included 1,182,346 individual sales involving consideration of $13,188,735,007.00 and assessed valuation of $4,894,603,440.00. The four months' check in the larger counties annually covered the most active months so far as real estate transfers are concerned and comprehended *every* transfer during that period. In all other counties all sales were checked.

ARGUMENT.

(1) The Order of the Supreme Court of Ohio does not deny residential property owners of Cuyahoga County equal protection of the laws of Ohio.

Petitioner's first argument, in effect, is that while discrimination does exist as to commercial property, this discrimination should be permitted to exist because *one way* to equalize (suggested by Petitioner) would be to raise the level of residential property assessments above the statewide average to produce the same tax dollars in Cuyahoga County. The amount of tax revenue is not in issue in this case and in any event is determined within statutory limitations by governmental agencies and outside such limitations by the electorate. The Ohio Supreme Court did not order the residential property ratio increased; it did order the Ohio Board of Tax Appeals "that if it finds that discrepancies exist in the tax assessments, as a whole or among the various classes of property, to direct such an order as is necessary to the county auditor to equalize such assessments." The Court's order was directed to end

discrimination. Petitioner is assuming that the Board of Tax Appeals will perpetuate discrimination.

From the Court's order it is clear that the residential ratio need not be increased; only that all classes be equalized as to the assessment ratio. Such equalization could result in an increased tax rate, but an increased rate on the basis of equalized assessments can in no sense be denominated discrimination against any group.

(2) The judgment does not give Cuyahoga County commercial property owners a preferential position.

The second argument offered by the Petitioner claims that under the order of the Ohio Supreme Court, the commercial class in Cuyahoga County would have a preferential position over the commercial property owners in the remaining counties of the State.

Again, this argument admits the discrimination extant in Cuyahoga County, but contends that correction of the Cuyahoga County maladjustment would afford commercial property owners in Cuyahoga County equalization and fulfillment of constitutional rights not enjoyed in the rest of the State. This resembles the argument of a man charged with speeding who contends he should not be convicted unless all speeders are similarly convicted.

The order of the Supreme Court of Ohio is directed to the Board of Tax Appeals, the supervisor of all auditors in the State, to "direct such an order as is necessary to the county auditor to equalize such assessments." The argument of the Petitioner is that the Board of Tax Appeals will issue an order which will not carry out the Court's mandate. Such an argument is, of course, bottomed on speciousness. It cannot be presumed that the Board of Tax Appeals will subvert the order of the Ohio

Supreme Court. To the contrary, it is well established law that a public official or body will be presumed to carry out its duties. 42 *American Jurisprudence* 680, Public Administrative Law, Section 240.

The Petitioner studiously avoids reference in his brief to the requirement of Article XII, Section 2 of the Ohio Constitution that "Land and improvements thereon shall be taxed by uniform rule according to value." The quoted sentence is the very essence of the order of the Ohio Supreme Court. The evidence, as summarized in the charts contained in this Respondent's brief, displayed without the slightest contradiction, that discrimination against commercial property; contrary to the provisions of Article XII, Section 2, existed in monumental proportions in Cuyahoga County. The Court's order is clearly and concisely directed to carry out the mandate of the Ohio Constitution.

(3) A fair trial was had.

The evidence proved beyond the peradventure of a doubt, and, in fact, without any attempt on the part of Petitioner or the other Respondents to demonstrate otherwise, that commercial property in Cuyahoga County was being assessed on a basis at least 36% higher than residential property. More than one-third higher is what Petitioner euphemistically refers to in his brief as "somewhat higher resultant assessed value ratio for commercial property in Cuyahoga County" (p. 18 Petitioner's brief). It would seem a permissible judicial inference from such a state of facts that something was awry in the assessor's (auditor's) office.

Petitioner chose not to introduce any evidence of his own. The Court did not foreclose this opportunity. In

view of Petitioner's own decision it can hardly be said he did not have a fair and impartial trial. Petitioner did not even dispute the evidence offered. The evidence itself consisted almost entirely of official studies of the Respondent Board of Tax Appeals.

The Ohio Supreme Court emphatically stated that value means market value. Consequently, no matter what method, or mode as suggested by Petitioner, is used to ascertain market value, the result, that is, the ascertainment of market value, is the sole objective. The method or mode is not sacrosanct. Modes which produce variations of over one-third between classes (as was demonstrated here) have obviously not produced the desired result—uniformity.

(4) The evidence submitted was properly admitted.

Edwin Ducey, Chief of the Division of County Affairs of the Respondent Board of Tax Appeals, through whom most of the exhibits were offered into evidence, testified that the deeds, which were reviewed in connection with the Board's Herculean statistical survey, were checked for continuing mortgages and encumbrances, and these were taken into consideration in determining sales prices. Thus, the example of the Petitioner (pp. 18-19 of Petitioner's brief) is completely without foundation, and his argument evaporates. Petitioner has failed, apparently, to comprehend Mr. Ducey's testimony as to the many checks and safeguards adopted to realize a remarkably large and accurate survey.

Petitioner also fails to acknowledge that *not one* sale was shown to be inaccurate. For each sale a card was made on which was compiled substantial information regarding the property involved. There was not the slightest showing by Petitioner or any other Respondent that

any of the information on these cards was in the slightest degree inaccurate or erroneous. Petitioner has laid no basis for complaint.

Furthermore, the question of what the Ohio Supreme Court should admit as evidence is not a federal question even though the evidence results from compliance with federal law.

Finally, such evidence has been generally treated as at least prima facie evidence of sales price. 51 *A. L. R.* 2d, 1004.

(5) The Ohio Supreme Court is the interpreter of the Ohio Constitution.

Whether or not classification of real property is permissible under the Federal Constitution is *not* in issue. In this case the Ohio Supreme Court has interpreted the Ohio Constitution to require that all classes of real property must be assessed and taxed only by uniform rule on the basis of value. The Court further held that value is market value, and that all methods of appraisement have as their primary objective the ascertainment of market value.

It would appear from Petitioner's brief that this Court is being asked to construe the Ohio Constitution, not by reason of any mandate of the Federal Constitution, but merely through Respondent's urging of another construction of the Ohio Constitution. It needs no citation of authority to establish that this Court does accept as final the construction of the Ohio Constitution given to it by the Ohio Supreme Court. This Court does not act as an appellate court to construe the Ohio Constitution when there is no claim that the State Constitution abrogates a right secured by the Federal Constitution. Petitioner has made no such claim here. The fact that a Federal Appellate Court, in the absence of an authoritative decision of the

Ohio Supreme Court, had employed a different construction of the Ohio Constitution (which the Appellate Court did not do in the case cited by Petitioner) would not in the least bind the Ohio Supreme Court in a later case. In fact, in many cases, the Federal Court has held an action in abeyance pending proceedings in the State Courts to obtain an authoritative decision of the highest State Court.

CONCLUSION.

Petitioner correctly stated on page 16 of its brief that the Ohio Supreme Court did not refer, either directly or indirectly, to the Fourteenth Amendment to the Constitution of the United States. Without determining any application of the Fourteenth Amendment, the Ohio Supreme Court construed Article XII, Section 2 of the Ohio Constitution to require the issuance of a mandamus to the Board of Tax Appeals to carry out the equalization duties specially enjoined upon it under Revised Code of Ohio Section 5715.24.

Petitioner in his brief fails to give a clue as to how he believes the Ohio Court order violated the Fourteenth Amendment. The Fourteenth Amendment, by various theories, incorporation, absorption and otherwise, has drawn the Bill of Rights into operation as to the actions of the States so far as the individual's rights as opposed to the State are concerned. However, the Fourteenth Amendment is inapplicable as to one arm of the State as opposed to another. Petitioner here is a party in his official capacity as County Auditor, an officer of a political subdivision of the State. Thus, the penumbra of the Fourteenth Amendment does not reach this relationship.

The only possible question properly raised by Petitioner thus relates to the use of federal revenue stamps as evidence of sales price. But this is a question of procedural

or adjective, not substantive, law. The State determines with finality its own rules of evidence. No substantive application of the Federal statutes is involved.

No cognizable question has been raised and the Petition should be overruled.

Respectfully submitted,

JOHN E. FORRESTER and
RALPH D. KOVANDA,

Attorneys for Respondent
The Park Investment Company.